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TRANSCRIPT OF RECORD

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 349

THE FIRST NATIONAL BANK OF CHICAGO,
EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON,
DECEASED,

Petitioner,

v.s.

UNITED AIR LINES, INC., A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

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THE FIRST NATIONAL BANK OF CHICAGO,
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TRANSCRIPT OF RECORD

In the
United States Court of Appeals

For the Seventh Circuit

No. 12327

THE FIRST NATIONAL BANK OF CHICAGO, Inc.
Plaintiff in Error, v. JOHN LOUIS NELSON, De-
fendant.

Plaintiff-Appellant.

UNITED AIR LINES, INC., a Corporation,
Defendant.

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED FEB. 5, 1951.

PRINTED RECORD.

In the

United States Court of Appeals

For the Seventh Circuit

No. 10337

THE FIRST NATIONAL BANK OF CHICAGO, EX-
ECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DE-
CEASED,

Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC., A CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 1st day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 175th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, January 26, 1951.

Court met pursuant to adjournment.

Present: Honorable Philip L. Sullivan, Trial Judge.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

The First National Bank of Chicago,
 Executor of the Estate of John
 Louis Nelson, Deceased,

Plaintiff-Appellant,

vs.

United Air Lines, Inc., a corporation,
Defendant-Appellee.

No. 48 C 1473.

**STATEMENT PURSUANT TO RULE 10B OF THE
 RULES OF THE UNITED STATES COURT OF
 APPEALS FOR THE SEVENTH CIRCUIT.**

This suit was commenced on October 5, 1948. The original parties were the plaintiff, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, and the defendant, United Air Lines, Inc.

The several dates on which the responsive pleadings were filed in this cause are as follows:

Filing Date and Pleading

1948

10/5 — Complaint.

11/15 — Answer.

1950

4/26 — Motion to Strike Third Defense of Defendant's Answer and in the Alternative to Transfer the cause.

11/8 — Amended Motion to Strike Third Defense of Defendant's Answer and in the Alternative to Transfer.

11/16 — Amendment to Motion to Strike.

3 1951

1/26 — Second amended Motion to Strike Third Defense of Defendant's Answer, and in the Alternative to Transfer Cause.

Complaint.

3

The motion to strike the third defense of defendant's answer and in the alternative to transfer the cause was denied and said cause dismissed by the Honorable Judge Sullivan on January 26, 1951, by an order entered on said date. The appeal from said order was on January 26, 1951.

4

IN THE UNITED STATES DISTRICT COURT
• • • (Caption—48-C-1473) • • •

Be It Remembered, that, on to-wit, the 5th day of October, 1948, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

5

IN THE DISTRICT COURT OF THE UNITED STATES
• • • (Caption—48-C-1473) • • •

COMPLAINT.

Now comes the plaintiff, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, and complains of the defendant, United Air Lines, Inc., a corporation, and says:

1. On the 24th day of October, 1947, the defendant, United Air Lines, Inc., was a corporation duly organized and existing and was engaged in the carriage of passengers for hire by aircraft, and the defendant was possessed of divers aircraft used by it in the conveyance of said passengers, and employed divers servants in the upkeep, maintenance and operation of said aircraft, all in the County of Garfield and the State of Utah.

2. The defendant was on said date a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and was then and ever since has been and now is a citizen and resident of the State of Delaware, and plaintiff was on said date and still is a citizen and resident of the State of Illinois, and the amount involved herein is in excess of \$3,000.00. Federal jurisdiction is based upon the diversity of citizenship of the plaintiff and the defendant.

3. The plaintiff's testate was then and there a passenger for hire upon a certain aircraft then and there operated and controlled by the defendant. The said flight departed Los Angeles, California, destined for Chicago, Illinois, and at the time of the occurrence hereinafter described was cruising at an altitude of 1900 feet over the State of Utah.

4. The gasoline for fuel consumption on said aircraft was contained in four main and four alternate tanks; the auxiliary tanks were empty. The No. 3 alternate tank vent outlet was located on the right side of the fuselage near the leading edge of the wing and close to the bottom wing fillet. At a point 10 feet aft of this point and slightly to the left there was an air scoop which served as a source of cabin heater combustion air and cooling air for the cabin supercharger air after-cooler and cabin supercharger oil cooler; and overflow gasoline coming from the No. 3 alternate tank through the air vent line and out the vent outlet would sweep back in the slip stream toward the cabin heater combustion air intake scoop. The entry of fuel overflow into the scoop in flight while the heater was operating was likely to backfire and thereby propagate flame downstream into the air scoop, and incoming fuel would thereafter be likely to continue to burn in the air scoop and duct.

5. The defendant then and there maintained on said aircraft emergency landing flares which were highly combustible and so located on said aircraft as to make their presence hazardous.

6. While the said aircraft was then and there in flight over the State of Utah, and the plaintiff's testate was riding therein, in the exercise of ordinary care for his own safety, as a passenger for hire, the said aircraft, by reason of said dangerous and defective construction thereof, and by reason of the unskillful and careless conduct of the defendant's servants in providing, maintaining and operating the same, became ignited, took fire and burned, and was thereby caused to be precipitated to the ground with great force and violence, and by reason thereof plaintiff's testate was so greatly injured and damaged that as a result thereof he then and there died.

7. The defendant was then and there guilty of one or more of the following acts of negligence which directly caused injury to the plaintiff's testate resulting in his death:

(a) The defendant so carelessly, negligently and improperly ran, managed, operated and propelled said air-

craft that the same became ignited and fell to the ground.

(b) The defendant carelessly and negligently permitted gasoline to enter the cabin heater air intake scoop from the No. 3 alternate tank vent.

(c) The defendant carelessly and negligently permitted an overflow of gasoline during the transfer of fuel from the No. 4 alternate tank.

(d) The defendant carelessly and negligently constructed and maintained said aircraft by improperly locating the No. 3 alternate tank or vent outlet so that gasoline might escape therefrom into the cabin heater combustion air intake scoop and become ignited.

8 (e) The defendant carelessly and negligently kept and maintained the emergency landing flares without proper protection from ignition.

(f) The defendant carelessly and negligently failed to properly instruct, warn and inform its servants in charge of the operation of said aircraft as to the dangers involved in its operation.

8. As a direct and proximate result of said acts of negligence, the plaintiff's testate was then and there so greatly cut, injured and damaged that as a result thereof he then and there died, and plaintiff's testate left him surviving, as his only heirs at law and next of kin, Rebecca E. Nelson, his widow, Ralph O. Nelson and James R. Nelson, his sons, and Ruth N. Gobel, his daughter, who by reason of the death of plaintiff's testate, have suffered pecuniary loss and damage and have been deprived of support, sustenance and maintenance and divers pecuniary benefits which they might otherwise have received by the continued life of plaintiff's testate.

Plaintiff demands damages in the sum of Two Hundred Thousand Dollars (\$200,000.00).

Royal W. Irwin,
Bishop, Mitchell and Burdett,
Attorneys for Plaintiff.

Royal W. Irwin,
29 S. LaSalle Street,
Chicago 3, Illinois,
Tel.: FR. 2-5454.

9 And afterwards on, to wit, the 12th day of October,
1948 there was filed in the Clerk's office of said Court
a certain Summons With Marshal's Return Endorsed
Thereon, in words and figures following, to wit: —

10. UNITED STATES DISTRICT COURT.
• • (Caption—48-C-1473) • •

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon
Royal W. Irwin, plaintiff's attorney, whose address is 29
South La Salle Street, Chicago, Illinois an answer to the
complaint which is herewith served upon you, within 20
days after service of this summons upon you, exclusive
of the day of service. If you fail to do so, judgment by
default will be taken against you for the relief demanded
in the complaint.

Roy H. Johnson,

Clerk of Court.

Marguerite Gilmour,

Deputy Clerk.

(Seal of Court)

Date: October 5, 1948.

Note.—This summons is issued pursuant to Rule 4 of
the Federal Rules of Civil Procedure.

United States Marshal's Return,
Northern District of Illinois.

Served this writ together with copy of complaint on the within named United Air Lines Inc. by delivering copies thereof to K. R. Gregory, assistant secretary of the C. T. Corporation System, registered agent for the United Air Lines, Inc., this 6th day of October, A. D. 1948. The President of the United Air Lines, Inc., not found in my District.

T. P. O'Donovan,
United States Marshal.
Wm. Raff,

Deputy.

1 Ser	2.00
2 mi	12
	<hr/>
	2.12

Endorsed: United States District Court * * (Caption—48-C-1473) * * Summons in Civil Action. Returnable not later than 20 days after service. Royal W. Irwin and Bishop, Mitchell & Burdett, Attorneys for Plaintiff.

11 And afterwards on, to wit, the 25th day of October, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Appearance in words and figures following, to wit:

12 UNITED STATES DISTRICT COURT.
 * * (Caption—48-C-1473) * *

APPEARANCE.

We hereby enter the appearance of United Air Lines, Inc., a corporation as defendant in the above entitled case and that of ourselves as attorneys for said defendant.

Dated: October ..., 194.....

David Jacker &
 Charles M. Rush,

*Attorneys for said Defendant, United
 Air Lines, Inc.,*

Address: 33 No. La Salle Street,
 Room 3200,

Telephone RA 6-2929, Chicago,
 Kirkland, Fleming, Green, Martin & Ellis.

13 And afterwards on, to wit, the 15th day of November, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer To Complaint in words and figures following, to wit:

14 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * (Caption—48-C-1473) * *

ANSWER TO COMPLAINT.

Now comes United Air Lines, Inc., by David Jacker, Charles M. Rush and Kirkland, Fleming, Green, Martin & Ellis, its attorneys, and for its answer to the complaint says:

1. That it admits the allegations of Paragraph 1, excepting the allegation "all in the County of Garfield and the State of Utah," which allegation it denies.

2. That it admits the allegations of Paragraph 2.

3. That it admits the allegations of Paragraph 3, excepting the allegation "was cruising at an altitude of 1900 feet," which allegation this defendant denies.

4. That it admits the allegation of Paragraph 4 beginning with "The gasoline for fuel consumption . . ." up to and including "and cabin supercharger oil cooler," but as to the remaining allegations in said Paragraph 4 this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations, and therefore denies said allegations.

5. That it admits that the said aircraft was equipped with emergency landing flares which were highly combustible; that it is without knowledge or belief as to the truth of the averment that these emergency landing flares were located on said aircraft as to make their presence 15 hazardous, and therefore denies the same.

6. That it admits that the plaintiff's testate was riding in the said aircraft in its flight over the State of Utah; that it is without knowledge or information sufficient to form a belief as to the truth of the averment that the plaintiff's testate was in the exercise of ordinary care for his own safety, and therefore denies the same, and it denies that by reason of the unskillful and careless conduct of the defendant's servants in providing, maintaining and operating the same it was thereby caused to be precipitated to the ground with great force and violence, resulting in the death of the plaintiff's testate.

7. That it denies the allegations of Paragraph 7.

8. That it denies that the plaintiff's testate died as a result of any negligence on the part of this defendant, and that it is without knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 8, and therefore denies the same.

Second Defense:

Plaintiff failed to file with defendant, at defendant's general office, a written notice of plaintiff's claim within ninety (90) days after the alleged occurrence of the events complained of as required under General Rule 17(A) of Local and Joint Passenger Rules Tariff No. PR-2, issued September 23, 1947, effective October 23, 1947, and on file with the Civil Aeronautics Board in Washington, D. C., and at all offices of the carrier, according to law. These rules are and at all times since the alleged occurrence of the events

complainant have been, in full force and effect. Defendant was and is a carrier participating in said rules. According to these rules, plaintiff may not bring this action.

Third Defense.

Defendant states that the Federal District Court does not have jurisdiction to try or hear the issues in this suit, for the reason that there was in full force and effect at 16 the time of the accident alleged herein a certain statute of the State of Illinois providing (Chapter 70 Illinois Revised Statutes, Section 2):

"* * *; provided further that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

Defendant further states that it is qualified to do business in the State of Utah under the laws of the State of Utah and that it has registered agents available in that state for service of process upon it.

Wherefore, this defendant asks that the suit be dismissed as to it.

David Jacker,
Charles M. Rush,
Kirkland, Fleming, Green, Martin & Ellis,
*Attorneys for Defendant United Air
Lines, Inc.,*
33 North La Salle Street,
RAndolph 6-2929.

Received a copy of the foregoing Answer to Complaint this 15 day of November, A. D. 1948.

Royal W. Irwin,
Attorney for Plaintiff.

17 And afterwards, to wit, on the 17th day of March, 1950, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

18

IN THE UNITED STATES DISTRICT COURT
(Caption—48-C-1473)

It Is Ordered by the Court that leave be and it is hereby given to the plaintiff to file any further pleadings within thirty (30) days and that this cause be and it is hereby continued generally for trial.

19 And afterwards on, to wit, the 26th day of April, 1950 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion to Strike Third Defense of Answer in words and figures following, to wit:

20 IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—48-C-1473)

MOTION TO STRIKE THIRD DEFENSE OF ANSWER.

Now comes the plaintiff, by Bishop, Mitchell and Burdett, its attorneys, and moves the court to strike the third defense contained in the Answer of United Airlines, Inc., a corporation, filed herein on November 15, 1948, and in support of said motion respectfully shows the court as follows:

1. Said third defense states that this court has no jurisdiction to try or hear the issues herein for the reason that the death complained of occurred outside of the State of Illinois, and Section 2 of the Illinois Injuries Act (Sec. 2, ch. 70, Ill. Rev. Stats.) provides that no action shall be brought or prosecuted in the State of Illinois to recover damages for death occurring outside of the State of Illinois, where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

2. Said Section 2, chapter 70 of the Illinois Revised Statutes does not and cannot limit the jurisdiction of
21 the Federal courts;

3. Said Section 2 does not declare the policy of the State of Illinois as being against recovery in such cases, but simply denies comity to the courts of the State of Illinois to entertain such actions. Said statute cannot limit the jurisdiction of the Federal courts.

MOTION IN THE ALTERNATIVE TO TRANSFER CASE.

In the alternative, in the event the above and foregoing Motion to Strike is not well founded in law and is overruled, the plaintiff then moves that this cause be transferred to the United States District Court, Central Division, in Salt Lake City, Utah, and in support of this alternative motion respectfully shows the court as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah.

2. That the defendant admits by its answer that it is qualified to do business in the State of Utah, and that it has registered agents available in that State for service of process upon it.

3. That the United States District Court, Central Division, in Salt Lake City, Utah, is comprised of counties including the County of Garfield.

4. That under Section 1406, (a), Title 28, United States Code Ann., provides as follows:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

22 Wherefore, in the alternative, plaintiff prays that said cause be transferred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,

Attorneys for Plaintiff,
1678 Board of Trade Building,
Chicago, Illinois,
Har. 7-3215.

Received a copy of the foregoing motion this 26th day of April, 1950.

Kirkland, Fleming, Green, Martin &
Ellis, per HC

Attorneys for Defendant.

23 And afterwards, to-wit, on the 8th day of November, 1950, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

24 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-1473) * *

It Is Ordered by the Court that leave be and it is hereby granted to the plaintiff to file instanter an amended motion to strike the third defense of the answer.

25 And on the same day, to-wit, the 8th day of November, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Amended Motion To Strike Third Defense Of Answer, And Alternative Motion To Transfer Case, in words and figures following, to-wit:

26 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-1473) * *

**AMENDED MOTION TO STRIKE THIRD DEFENSE
OF ANSWER, AND ALTERNATIVE MOTION TO
TRANSFER CASE.**

Now comes the plaintiff, by Bishop & Burdett, its attorneys, leave of court having first been duly had and obtained, and moves the court to strike the third defense contained in the Answer of United Airlines, Inc., a corporation, filed herein on November 15, 1948, and in support of said motion respectfully shows the court as follows:

1. The proviso of section 2 of the Injuries Act (Ill. Rev. Stats. 1949, ch. 70, sec. 2) is unconstitutional and void as being in violation of the single subject requirement of Section 13 of Article IV of the Constitution of 1870.

(a) Sections 1 and 2 of the chapter on injuries were enacted in 1853. Section 1 created the cause of action

for death by wrongful act. Section 2, as originally enacted, provided who should bring such action, for whose benefit the recovery was had, fixed a limit on the amount of recovery, and fixed a limitation period within which the action had to be brought.

27 The title of the enactment was and is: "An Act requiring compensation for causing death by wrongful act, neglect or default."

The single subject requirement of Section 13 of Article IV is: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The subject matter of the original two sections was clearly embodied in the title of the act noted above. The first section created the cause of action and the second section provided the details as to who should bring it, for whose benefit recovery was to be had, the amount of the recovery and the time within which the action should be brought.

Section 2 was amended in 1903 (Laws 1903, p. 217). The title of the amendatory act of 1903 was: "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'." This amendatory act added the proviso: "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State." It is obvious that this proviso added a new subject to that contained in the title of the enactment, namely, a denial of comity on the part of Illinois' courts of actions created by the statutes of other jurisdictions.

(b) It is also obvious that the proviso added to Section 2 a subject and contents different than those originally embraced by Section 2, namely, the denial of comity; and the Illinois cases construing the single subject requirement of its constitution hold that where the title of an amendatory act is similar to that of the 1903 amendatory act, no new provisions not already embraced in the section amended may be added thereto.

28 2. Said proviso to Section 2 of the Injuries Act is violative of the full faith and credit clause of the Federal Constitution.

3. The proviso to Section 2 of the Injuries Act can in no way affect the jurisdiction of the Federal courts.

The Illinois courts have repeatedly held that actions for wrongful death in no way violate the public policy of the State of Illinois.

All that the proviso purports to accomplish is a denial

of comity on the part of Illinois courts to actions created by statutes of other jurisdictions.

Comity is a matter of practice and procedure; and the granting or denial of comity on the part of Federal courts is not a subject where state law would control under the doctrine of *Erie v. Tompkins*, 304 U. S. 64.

MOTION IN THE ALTERNATIVE TO TRANSFER CASE.

In the alternative, in the event the above and foregoing Motion to Strike is not well founded in law and is overruled, the plaintiff then moves that this cause be transferred to the United States District Court, Central Division, in Salt Lake City, Utah, and in support of this alternative motion respectfully shows the court as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah.

2. That the defendant admits by its answer that it is qualified to do business in the State of Utah, and that it has registered agents available in that State for service of process upon it.

29 3. That the United States District Court, Central Division, in Salt Lake City, Utah, is comprised of counties including the County of Garfield.

4. That under Section 1406 (a), Title 28, United States Code Ann., provides as follows:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Wherefore, in the alternative, plaintiff prays that said cause be transferred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,

Attorneys for plaintiff,
1678 Board of Trade Building,
Chicago, Illinois,
Har. 7-3215.

30 And afterwards on, to wit, the 16th day of November, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Amendment To Motion In The Alternative To Transfer Case in words and figures following, to wit:

31 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—48-C-1473)

**AMENDMENT TO MOTION IN THE ALTERNATIVE
TO TRANSFER CASE.**

Now comes the plaintiff, by Bishop & Burdett, leave of court having first been duly had and obtained, and amends paragraph one (1) of the Motion in the Alternative to Transfer Case to read as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah, on the 24th day of October, 1947. That the Statute of the State of Utah requires that actions for wrongful death be commenced within two years from the date on which such cause of action occurred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,

Attorneys for plaintiff,
1820 Board of Trade Building,
Chicago 4, Illinois,
Ha 7—3215.

32 And afterwards, to-wit, on the 17th day of November, 1950, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

33 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-1473) * *

It Is Ordered by the Court that leave be and it is hereby granted to the plaintiff to amend the motion in the alternative to transfer this cause and it is

Further Ordered that this cause be and it is hereby continued to January 5, 1951.

34 And afterwards on, to wit, the 1st day of February, 1951, there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On January 19, 1951, Before The Honorable Philip L. Sullivan, Judge, in words and figures following, to wit:

36 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-1473) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before Honorable Philip L. Sullivan, one of the Judges of said Court, in his Court Room in the United States Court House, at Chicago, Illinois, on Friday, January 19, 1951.

Messrs. Bishop & Burdett, by Mr. Robert J. Burdett, appeared on behalf of the Plaintiff.

Messrs. Kirkland, Fleming, Green, Martin & Ellis, by Mr. David Jacker, appeared on behalf of the Defendant.

37 The Clerk: First National Bank of Chicago, etc. vs. United Air Lines.

The Court: I will give you my conclusions:

Plaintiff's motion to strike the third defense of the answer should be denied for the following reasons: (1) Neither Section 13 of Article IV of the Illinois constitution nor the Full Faith and Credit Clause of the United States Constitution are violated by Section 2 of the Illinois Death by Wrongful Act statute. A District Court will declare a state statute unconstitutional only if its invalidity is clearly apparent. Such invalidity was not proven here, and (2) Section 2 of the Illinois Death by Wrongful Act statute deprives this court of jurisdiction. (*Munch v. United Air Lines*, 184 F. 2d 630.) The alternative motion to transfer under Section 1406(a) of the Judicial Code should be denied for the following reasons: (1) this suit was not brought in the wrong venue, and (2) the Court does not have jurisdiction to order the transfer to Utah.

Bring in an order.

Mr. Burdett: If your Honor please, for the first time in my reply brief we argued the point at some length that a deprivation of this court's jurisdiction by reason of the proviso in Section 2, the Injuries Act, raises a federal question under Article III of the Federal Constitution. Now, may I have leave to formally put that point in my motion to strike, so it will be preserved in the record? You understand, sir, I say that the jurisdiction of this Court springs from Article III of the Federal Constitution; and that, therefore, it cannot be curtailed or abridged by reason of any state statute; and so your holding would involve of itself a federal question.

The Court: If you want to amend your pleading, you may; and then you can raise whatever question is to be raised by it.

The Clerk: Bring in an order.

Mr. Jacker: When should we come in on the order?

The Court: I would say a week from today.

40 - And afterwards on, to wit, the 26th day of January, 1951, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Second Amended Motion To Strike Third Defense of Answer, And Alternative Motion To Transfer Case in words and figures following, to wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * * (Caption—48-C-1473) * * *

SECOND AMENDED MOTION TO STRIKE THIRD DEFENSE OF ANSWER, AND ALTERNATIVE MOTION TO TRANSFER CASE

Now comes the plaintiff, by John H. Bishop, Robert J. Burdett and John M. Falasz of Bishop & Burdett, its attorneys, leave of court having first been duly had and obtained, and moves the court to strike the Third Defense contained in the Answer of United Airlines, Inc., a corporation, filed herein on November 15, 1948, and in support of said motion respectfully shows the Court as follows:

1. The proviso of section 2 of the Injuries Act (Ill. Rev. Stats. 1949, ch. 70, par. 2) is unconstitutional and void as being in violation of the single subject requirement of Section 13 of Article IV of the Constitution of 1870.

(a) Paragraphs 1 and 2 of the chapter on Injuries were enacted in 1853, (Ill. Rev. Stats. 1949, ch. 72, pars. 1 and 2) paragraph 1 created the cause of action for death by wrongful act. Paragraph 2, as originally enacted, provided who should bring such action, for whose benefit the recovery was had, fixed a limit on the amount of recovery, and fixed a limitation period within which the action had to be brought.

The title of the enactment was and now is: "An Act requiring compensation for causing death by wrongful act, neglect or default". (Italics ours.)

The single subject requirement of Section 13 of Article IV is: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The subject matter of the original two sections was clearly embodied in the title of the act noted above. That was an

Act requiring compensation for death by wrongful act. The first section created the cause of action and the second section provided the details as to who should bring it, for whose benefit recovery was to be had, the amount of recovery and the time within such the action should be brought.

Section 2 was amended in 1903 (Laws 1903, p. 217). The title of the amendatory act of 1903 was: "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'". This amendatory act added the proviso: "Provided, further, that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this State." Section 2 was again amended in 1935 (Laws 1935, p. 916) under a title the same as that of 1903. This amendatory act changed the above quoted proviso to read: "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." It is obvious that the provisos inserted in 1903 and 1935 added a new subject to the content of the title of the enactment. That title created a cause of action requiring compensation for wrongful death. The additions inserted by the amendments denied compensation for wrongful death in Illinois in such cases where the rights of action were created by sister States.

(b) It is also obvious that the provisos added to Section 2 a subject and content different than those originally embraced therein, namely, the denial of recovery; and the Illinois cases construing the single subject requirement of its constitution hold that where the title of an amendatory act is similar to that of the 1903 and 1935 amendatory acts, no new subject not already embraced in the section amended may be added thereto.

2. Said proviso to Section 2 of the Injuries Act is violative of the full faith and credit clause of the Federal Constitution (Sec. 1, Art. IV, Constitution of the United States).

(a) An action permitting recovery for wrongful death in no way violates Illinois' policy. By its own statute, Illinois has created such a right of action. Therefore,

Illinois has no governmental interest to prevent the enforcement of such a right of action created by the laws of a sister state, and the proviso denying access to Illinois' courts is void under the full faith and credit clause.

3. Said proviso to Section 2 of the Injuries Act can in no way affect the jurisdiction of the Federal District Court.

44 (a) Denial of jurisdiction is a matter of practice and procedure—adjective law—and the granting or denial of jurisdiction on the part of Federal Courts is not a subject which State law may control under the doctrine of *Erie v. Tompkins*, 304 U. S. 64.

(b) A construction of the doctrine of *Erie v. Tompkins* which makes the proviso of Section 2 of the Injuries Act deprive the Federal District Court of jurisdiction in this case, is in violation of Article III of the Constitution of the United States. That Article of the Constitution (Sec. 2) creates power in Congress to grant jurisdiction in diversity cases to the District Court. Congress has conferred such jurisdiction in pursuance of such constitutional authority. Therefore, such jurisdiction exists 'by the supreme law of the land', and it cannot be cut down, bridged or destroyed by any statute of any State.

MOTION IN THE ALTERNATIVE TO TRANSFER CASE.

In the alternative, in the event the above and foregoing Motion to Strike is held to be not well founded in law and is overruled, the plaintiff then moves that this cause be transferred to the United States District Court, Central Division, in Salt Lake City, Utah, and in support of this alternative motion respectfully shows the Court as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah, on the 24th day of October, 1947. That the Statute of the State of Utah requires that actions for wrongful death be commenced within two years from the date on which such cause of action occurred.

2. That the defendant admits by its answer that it is qualified to do business in the State of Utah, and that it has registered agents available in that State of
45 service of process upon it.

3. That the United States District Court, Central

Division, in Salt Lake City, Utah is comprised of counties including the County of Garfield.

4. That Section 1406 (a), Title 28, United States Code Ann., provides as follows:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Wherefore, in the alternative, plaintiff prays that said cause be transferred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,

Attorneys for Plaintiff,

1820 Board of Trade Building,
Chicago 4, Illinois,
Har 7-3215.

46 And on the same day, to wit, on the 26th day of January, 1951, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

47 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-1473) * *

JUDGMENT ORDER.

On motion of plaintiff, First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, and due notice having been given:

It Is Ordered that leave be and the same is hereby granted said Plaintiff to file instanter its Second Amended Motion to Strike the Third Defense of the Answer of Defendant, United Air Lines, Inc., and to raise by said second amended motion to strike the contention that if the proviso to Section 2 of the Injuries Act of Illinois (Ill. Rev. Stats., 1949, ch. 70, par. 2), denying jurisdiction to Illinois Courts to entertain actions for foreign deaths,

has the effect of depriving this Court of jurisdiction to entertain this action, then such effect is in violation of Article III of the Constitution of the United States.

And this cause now coming on to be heard upon said Second Amended Motion to Strike the Third Defense of Defendant's Answer and the Alternative Motion to Transfer this case under Section 1406 (a) of the Judicial Code (Sec. 1406 (a), Tit. 28, U. S. C. A.), and the Court being fully advised in the premises, Doth Find as follows as matters of law:

1. The proviso to Section 2 of the Injuries Act (Ill. Rev. Stats. 1949, ch. 70, par. 2) denying jurisdiction to Illinois Courts to entertain or hear actions for foreign deaths does not violate the single subject requirement of Section 13 of Article IV of the Illinois Constitution of 1870;

2. Said proviso to Section 2 of the Injuries Act does not violate the full faith and credit clause of the Federal Constitution (Sec. 1, Art. IV, Constitution of the United States);

3. Said proviso to Section 2 of the Injuries Act deprives this Court of jurisdiction to entertain or hear this action and such deprivation of the jurisdiction of this Court does not violate Article III of the Constitution of the United States;

4. This suit was not brought in the wrong venue within the meaning of Section 1406 (a) of the Judicial Code;

5. This Court, not having jurisdiction of this cause of action, no transfer to Utah can be made; under the provisions of Section 1406 (a) of the Judicial Code;

6. This Court, not having jurisdiction of this cause of action, has no power to order transfer to Utah under the provisions of Section 1406 (a) of the Judicial Code.

It Is Therefore Ordered that Plaintiff's Second Amended Motion to Strike the Third Defense of Defendant's Answer be and the same is in all respects overruled for the reasons set forth in findings 1, 2 and 3 above;

It Is Further Ordered that Plaintiff's alternative motion to transfer this cause to the United States District Court, Central Division, at Salt Lake City, Utah, be and the same is denied for the reasons set forth in findings 4, 5 and 6 above.

Judgment.

And the Plaintiff declining to plead further, and thereby admitting the allegations of fact contained in said Third Defense;

It Is Ordered that this case be and the same is hereby dismissed at Plaintiff's costs and that Plaintiff take nothing by its suit against defendant, United Air Lines, Inc.

Enter:

Philip L. Sullivan,
Judge.

50 And on the same day, to wit, the 26th day of January, 1951 came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal and Bond on Appeal in words and figures following, to wit:

51 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

The First National Bank of Chicago,
Executor of the Estate of John
Louis Nelson, Deceased,
Plaintiff-Appellant,
vs.
United Air Lines, Inc., a corporation,
Defendant-Appellee. } No. 48 C 1473.

NOTICE OF APPEAL TO THE UNITED STATES
COURT OF APPEALS, FOR THE SEVENTH CIR-
CUIT.

To: David Jacker, Charles M. Rush, John M. O'Connor,
Jr., of Kirkland, Fleming, Green, Martin & Ellis,
33 North La Salle Street,
Chicago 2, Illinois.
Attorneys for Defendant-Appellee.

Notice is hereby given you that The First National Bank
of Chicago, Executor of the Estate of John Louis Nelson,
Deceased, plaintiff-appellant above named, hereby appeals
to the United States Court of Appeals for the Seventh Cir-
cuit from the final judgment order entered against the plain-
tiff in this action on January 26, 1951.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
of Bishop and Burdett,
Attorneys for Plaintiff-Appellant.

Dated this 26th day of January, 1951.

Received a copy of the foregoing notice of appeal this
26th day of January, 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.
of Kirkland, Fleming, Green, Martin
& Ellis,
Attorneys for defendant-appellee.

(Certificate of Mailing Attached Hereto):

52 United States of America, } ss:
Northern District of Illinois. }

The First National Bank of Chicago, etc., }
vs. } No. 48 C 1473:
United Air Lines, Inc. }

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on January 26, 1951, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Kirkland, Fleming, Green, Martin & Ellis, 33 N. La Salle St., Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of January, 1951.

Roy H. Johnson,

(Seal)

Clerk.

By Gizella Butcher,

Deputy Clerk.

53 Know all Men by these Presents:

That we, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, as principal, and _____ as sureties, are held and firmly bound unto United Air Lines, Inc., in the full and just sum of Two Hundred Fifty Dollars to be paid to the said United Air Lines, Inc., attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 26th day of January in the year of our Lord one thousand nine hundred and Fifty-one.

Whereas, lately at a session of the United States District Court for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, and the United Air Lines, Inc., a judgment was rendered against The First National Bank

of Chicago, Executor of the Estate of John Louis Nelson, Deceased and the said The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, to reverse the judgment of the aforesaid suit, in the United States Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof

Now, the condition of the above obligation is such, that if the said First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, shall pay the cost if the appeal is dismissed or the judgment affirmed, or pay such costs as the appellate court may award if the judgment is modified then the above obligation to be void; otherwise to remain in full force and virtue.

The First National Bank of Chicago,
Executor of the Estate of John
Louis Nelson, Deceased.

By B. B. Manchester,

Assistant Trust Officer.

(Seal)

Sealed and delivered in presence of:

W. M. Doherty.

United States Fidelity and Guaranty
Co.,

By D. T. Harper,

Attorney-in-Fact.

(Seal)

Approved by:

(Power of Attorney Attached But Not Copied.)

54 And on the same day, to wit, the 31st day of January, 1951, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points in words and figures following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—48-C-1473)

STATEMENT OF POINTS.

The plaintiff-appellant, The First National Bank of Chicago, as executor of the Estate of John Louis Nelson, deceased, proposes on its appeal to the United States Court of Appeals for the Seventh Circuit, to rely upon the following points as error:

1. The Court erred in finding the proviso to Section 2 of the Injuries Act (Ill. Rev. Stats. 1949, Ch. 70, Par. 2), creating a jurisdictional bar as to Illinois Courts, does not contravene the single subject requirement of Section 13 of Article IV of the Illinois Constitution of 1870.

2. The Court erred in finding that said proviso to Section 2 of the Injuries Act does not contravene the full faith and credit clause of the Federal Constitution (Sec. 1, Article IV; Constitution of the United States).

3. The Court erred in finding that said proviso to Section 2 of the Injuries Act deprived it of jurisdiction to entertain or hear this action and that such deprivation of jurisdiction does not violate Article III of the Constitution of the United States.

4. The Court erred in overruling the Plaintiff's
56 Second Amended Motion to Strike the Third Defense of Defendant's Answer.

5. The Court erred in denying Plaintiff's Alternative Motion to transfer this cause to the United States Court, Central Division, at Salt Lake City, Utah.

6. The Court erred in entering judgment for Defendant.

John H. Bishop,
Robert J. Burdett,
John Falasz,

of Bishop and Burdett,

Attorneys for Appellant,
141 West Jackson Blvd.,
HARRISON 7-3215.

Received copy of the foregoing statement of points on which the appellant intends to rely on appeal this 31 day of January, A. D. 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Attorneys for Defendants.

57 And afterwards on, to wit, the 31st day of January, 1951, came the Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Contents of Record on Appeal in words and figures following, to wit:

58 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-1473) * *

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL.

Applicant, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, plaintiff in the above entitled action, hereby requests the Clerk to prepare a record of proceedings in the above cause to be presented on appeal to the United States Court of Appeals for the Seventh Circuit, and designates the following to be inserted in that record:

1. Complaint.
2. Summons.
3. Appearance of defendant.
4. Answer of defendant.
5. Order of Court entered March 17, 1950, granting leave to plaintiff to file further pleadings.
6. Motion of plaintiff to strike the third defense of defendant's answer and in the alternative to transfer the cause.
7. Order of court entered on November 8, 1950 granting leave to plaintiff to file instanter an amendment to motion to strike third defense of defendant's answer and in the alternative to transfer the cause.
- 59 8. Amendment to motion to strike third defense of defendant's answer and in the alternative to transfer the cause.
9. Order of Court entered November 17, 1950, granting leave to plaintiff to file amended motion to strike third defense of defendant's answer and in the alternative to transfer cause.
10. Amended motion to strike third defense of defendant's answer and in the alternative to transfer cause.
11. Order of Court entered January 26, 1951, giving leave to plaintiff to file second amended motion to strike the

Designation of Record.

third defense of defendant's answer and in the alternative to transfer cause, which order further denies said motion to strike and to transfer and enters judgment for defendant.

12. Second amended motion to strike third defense of defendant's answer, and in the alternative to transfer said cause, filed January 26, 1951.

13. Plaintiff's notice of appeal and certificate of Clerk of mailing same to defendant.

14. Plaintiff's appeal bond.

15. Designation of contents of record on appeal.

16. Statement pursuant to rule 10 (b) of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit.

17. Statement of points on which appellant intends to rely on appeal.

18. Stenographic report of proceedings before the Hon. Judge Sullivan taken on hearing on January 19, 1951.

John H. Bishop,
Robert J. Burdett,
John Falasz,

Of Bishop & Burdett,
*Attorneys for the First National Bank
of Chicago, Executor of the Estate of
John Louis Nelson, deceased, plain-
tiff-appellant,*
141 West Jackson Blvd.,
Ha 7-3215.

Received a copy of the foregoing Designation of Contents of Record on Appeal this 31st day of January, 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green,
Martin & Ellis,
*Attorneys for defendant-
appellee.*

60 And afterwards on, to wit, the 1st day of February, 1951, came the Appellee by its attorneys and filed in the Clerk's office of said Court its certain Appearance in words and figures following, to wit:

61 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-1473) * *

APPEARANCE.

Now comes United Air Lines, Inc., a corporation, and, in compliance with Rule 10(c) of the Rules of the United States Court of Appeals for the Seventh Circuit, states that it is the appellee in the above entitled cause and that its attorneys are David Jacker, Charles M. Rush and John M. O'Connor, Jr., of Kirkland, Fleming, Green, Martin & Ellis, 33 North La Salle Street, Chicago 2, Illinois, Randolph 6—2929.

United Air Lines, Inc., a corporation,
By David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green
Martin & Ellis.

Clerk's Certificate.

62 United States of America, }
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed by the Plaintiff-Appellant, in this Court in the cause entitled: The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, Plaintiff *vs.* United Air Lines, Inc., corporation, No. 48-C-1473, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of February, 1950.

Roy H. Johnson,

Clerk.

By Gizella Butcher,

Deputy Clerk.

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed February 8, 1951, in:

Cause No. 10,337

The First National Bank of Chicago, Executor of the
Estate of John Louis Nelson, Deceased,
Plaintiff-Appellant,

vs.

United Air Lines, Inc., a Corporation,
Defendant-Appellee,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 16th day of February, A. D. 1951.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord, one thousand nine hundred and fifty, and of our Independence the one hundred seventy-fifth:

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
Plaintiff-Appellant,

10,337

vs.

United Air Lines, Inc., a Corporation,
Defendant-Appellee.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Appearance of Counsel.

And afterward, to-wit, on the seventh day of February, 1951, there was filed in the office of the Clerk of this Court an Appearance of Counsel for the Appellant, which said Appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Cause No. 10,337.

The First National Bank of Chicago, Executor of the
Estate of John Louis Nelson, Deceased,
Plaintiff-Appellant,

vs.

United Air Lines, Inc.,
Defendant-Appellee.

The Clerk will enter our appearance as counsel for
Appellant.

Robert J. Burdett,
141 W. Jackson Blvd.,
Chicago, Illinois.

John H. Bishop,
141 W. Jackson Blvd.,
Chicago, Illinois.

John Falasz,
141 W. Jackson Blvd.,
Chicago, Illinois.

Endorsed: Filed February 7, 1951. Kenneth J. Garrick,
Clerk.

And on the same day, to-wit, on the seventh day of February, 1951, there was filed in the office of the Clerk of this Court an Appearance of Counsel for the Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Cause No. 10,337.

The First National Bank of Chicago, Executor of the
Estate of John Louis Nelson, Deceased,

Plaintiff-Appellant,

vs.

United Air Lines, Inc.,

Defendant-Appellee.

The Clerk will enter our appearance as counsel for Appellee.

David Jacker,
33 N. La Salle Street,
Chicago, Illinois.

Charles M. Rush,
33 N. La Salle Street,
Chicago, Illinois.

John M. O'Connor, Jr.,
33 N. La Salle Street,
Chicago, Illinois.

Endorsed: Filed February 7, 1951. Kenneth J. Carrick,
Clerk.

Designation of Record.

And afterwards, to-wit, on the ninth day of February, 1951, there was filed in the office of the Clerk of this Court a Designation of Record, which said Designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10,337.

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
Plaintiff-Appellant,
vs.
 United Air Lines, Inc., a Corporation,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

DESIGNATION OF RECORD.

To: Hon. Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago, Illinois:

The undersigned requests you to make a transcript to be filed as the record on petition for writ of certiorari in the United States Supreme Court consisting of all docket entries, all papers filed, and all proceedings had in the above entitled case.

Dated at Chicago, Illinois, this 9th day of February, 1951.

John N. Bishop,
 Robert J. Burdett,
 John M. Faiaz,

Of Bishop & Burdett,

Attorneys for the First National Bank, of Chicago, Executor of the Estate of John Louis Nelson, deceased, Plaintiff-Appellant,

141 West Jackson Blvd.,
 Ha 7-3215.

Received a copy of the foregoing Designation of Record
this 9th day of February, 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green,
Martin & Ellis;
*Attorneys for Defendant-Appel-
lee.*

Endorsed: Filed February 9, 1951. Kenneth J. Carrick,
Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and proceedings had, made in accordance with the designation of record, filed February 9, 1951, in:

Cause No. 10,337

The First National Bank of Chicago, Executor of the
Estate of John Louis Nelson, Deceased,
Plaintiff-Appellant,

vs.

United Air Lines, Inc., a Corporation,
Defendant-Appellee,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 16th day of February, A. D. 1951.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

And afterward, to-wit on the thirteenth day of April, 1951, there was filed in the office of the Clerk of this Court a certified copy of Supreme Court order denying a petition for a Writ of Certiorari, which said order is in the words and figures following, to-wit:

SUPREME COURT OF THE UNITED STATES.

No. 558—October Term, 1950.

First National Bank of Chicago, as Executor of the
Estate of John Louis Nelson, deceased,
Petitioner,

vs.

United Air Lines, Inc., a corporation.

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Court of Appeals for the Seventh Circuit, it is ordered by this Court that the said petition be, and the same is hereby, denied.

April 9, 1951.

A true copy
Test:

Charles Elmore Cropley,
*Clerk of the Supreme Court of the
United States,*

By Hugh W. Barr,
Deputy.

(Seal)

Endorsed: Filed Apr. 13, 1951. Kenneth J. Carrick,
Clerk.

And afterward, to-wit, on the fifth day of July, 1951, there was filed in the office of the Clerk of this Court the opinion of the Court which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 103337.

October Term, 1950, April Session, 1951.

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
Plaintiff-Appellant,
vs.
 United Air Lines, Inc., a Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 5, 1951.

Before KERNER, FINNEGAN, and LINDLEY, Circuit Judges.

Per Curiam. This is an appeal from a summary judgment dismissing an action brought by plaintiff against defendant to recover damages for the death of plaintiff's testate, because of his wrongful death while a passenger aboard one of defendant's airliners which crashed on October 24, 1947, at Bryce Canyon, Utah. Jurisdiction is based on diversity of citizenship and amount in controversy. Plaintiff's testate prior to his death was a resident and citizen of Illinois. Defendant is a Delaware corporation whose principal office is located at Chicago, Illinois, but it is qualified to do business in the state of Utah and has registered agents available in that state for service of process upon it. The action was brought under the Utah wrongful death statute. Section 104-3-11, U.C.A. 1943.

Defendant answered the complaint and moved for summary judgment on the ground that ch. 70, §2 of the Ill. Rev.

St. operated as a bar to the maintenance of the action in Illinois. That section provides: " . . . that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

In answer to defendant's motion, plaintiff contended, *inter alia*, that the Illinois statute could not limit the jurisdiction of the federal courts, even though service of process could be had upon the defendant in Utah, and argued that to hold that it did would violate the full faith and credit clause of Art. IV, §1 of the United States Constitution. The trial judge held the Illinois statute deprived the District Court of jurisdiction and that the full faith and credit clause of the Constitution had not been violated.

This court has already held that the provisions of the Illinois statute were binding on the federal courts in Illinois, and constituted a bar to the maintenance of an action for damages for wrongful death in an action where, as here, a right of action for such death exists under the laws of the state where the death occurred. *Trust Co. of Chicago v. Pennsylvania R. Co.*, 183 F. 2d 640, and *Munch v. United Air Lines*, 184 F. 2d 630. But in those cases no contention was made, that the Illinois statute violated Art. IV, §1 of the United States Constitution.

In this court plaintiff renews its contention and cites *Hughes v. Fetter*, 341 U. S., decided June 4, 1951, which it says is conclusive on the question presented on this appeal. In that case appellant brought his action in a Wisconsin state court to recover for the death of his intestate in Illinois. He based his complaint on the Illinois wrongful death statute. The trial court held appellant's action was barred in Wisconsin because the Wisconsin statute created a right of action only for a death caused in that state. The Wisconsin Supreme Court affirmed, 257 Wis. 35. The United States Supreme Court, although reaffirming the principle that "full faith and credit does not automatically compel a forum state to subordinate its own statutory policy," recognized that there is a conflict of policies which requires that one be accepted and the other rejected, and held that Wisconsin's expressed statutory policy against permitting Wisconsin courts to entertain foreign wrongful death actions was in the face of and contrary to the natural policy embodied in the full faith and credit clause of the Constitution.

The fact that the absolute bar to the action in the Wisconsin courts might result in the total extinguishment of the cause of action because of the practical difficulties of service of process in Illinois apparently influenced the majority to tip the scales in favor of accepting the full faith and credit policy as against the right of Wisconsin to close its courts to causes of action for wrongful death arising out of the state.

In our case no such compelling reason appears. The Illinois statute, as we have already observed, differs substantially from the Wisconsin statute in that it does not, without exception, exclude all foreign wrongful death actions but only those as to which "a right of action . . . exists under the laws of the place where such death occurred and service of process . . . may be had upon the defendant in such place." Thus, it seems clear that whereas the Wisconsin statute constituted an absolute and unconditional refusal on the part of that state to enforce in its courts the wrongful death statutes of sister states, the Illinois act recognizes the existence and enforceability of the right of action created by such statutes and authorizes the courts of Illinois to entertain such actions, except in cases where they are capable of being prosecuted to judgment in the courts of the state which created them. Whether the Illinois statute and the policy reflected thereby—a policy which appears to be based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts—offend against the Constitution's full faith and credit clause is the crucial question presented on this appeal. Its solution can not, it seems to us, be found in the disposition of a case in which the court observed that the statute held unconstitutional could not be regarded as "an application of the *forum non conveniens* doctrine" and went on to point out that the proscribed legislation might result in "a deprivation of all opportunity to enforce valid death claims created by another state,"—a result which can never obtain under the terms of the Illinois statute.

In the light of the Supreme Court's repeated declaration that "the full faith and credit clause is not an inexorable and unqualified command" and that, consistently with its proper application, "there are limits to the extent to which the laws and policy of one state may be subordinated to those of another," *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 210-211; *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U. S. 532, 546, 547; *Pacific Employers*

Ins. Co. v. Industrial Accident Commission, 306 U. S. 493, 501; *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 498; *Williams v. North Carolina*, 317 U. S. 287, 302, the constitutionality of the Illinois act would seem to us to be dependent on the reasonableness of the conditions it establishes for the maintenance, in the courts of Illinois, of an action arising under the wrongful death statute of a sister state, i. e., on whether the statute is "a permissible limitation on the full faith and credit clause," *Williams v. North Carolina*, 317 U. S. 287, 302; *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U. S. 532, 546-547, rather than on the fact that a statute which unconditionally excludes all actions based on foreign statutes has been held to violate that clause.

While it is true, as plaintiff argues, that the Illinois statute is not expressive of a policy against wrongful death suits in general, it is clearly an expression of a public policy against permitting Illinois courts to entertain any wrongful death suit which is capable of reduction to judgment in a forum of the state under whose laws it arose. We can not believe that this policy is violative of the constitutional requirement of full faith and credit. On the contrary, it recognizes the validity and enforceability of the wrongful death statutes of sister states, and provides for their enforcement in the courts of Illinois in the event they can not be enforced in the courts of the state which enacted them. It is hardly to be doubted that the Illinois statute, in tending to regulate and reduce the case load of the Illinois courts, tends to promote the prompt and orderly administration of justice in those courts, which is, undeniably, a matter of vital and legitimate concern to that state. Consequently, since "Prima facie every state is entitled to enforce in its own courts its own statutes" and "One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum," *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U. S. 532, 547-548, it becomes necessary to inquire whether Utah's interest in having its statute enforced in Illinois in a case where it is capable of enforcement in Utah can be said to be superior to Illinois' interest in having its courts free to try cases arising in and under the laws of Illinois without the added burden of trying cases arising in and under the laws of a sister state and triable therein. It seems to us that it can

not. Therefore, we hold that the Illinois statute involved in the instant case is permissible legislation under the full faith and credit clause and expressive of a public policy of Illinois not inconsistent with the proper application of that clause.

Plaintiff's next contention is that the 1935 amendment to the Illinois statute under consideration, which added the proviso limiting the wrongful death jurisdiction of the Illinois courts, violates the single-subject requirement of Art. IV of §13 of the Illinois Constitution. We think this contention is without merit.

In *Michaels v. Hill*, 328 Ill. 11, 15-16, it was said: "All doubts or uncertainty arising from the language of the constitution or of the act must be resolved in favor of the validity of the act, and the court will assume to declare it void only in case of a clear conflict with the constitution. It is the duty of the court to so construe acts of the legislature as to uphold their constitutionality if such can reasonably be done. If their construction is doubtful the doubt is to be resolved in favor of the law. * * * To render an act or a portion thereof void as not embraced in the title it must be seen that it is incongruous with or has no proper connection with or relation to the title. If by any fair construction the provisions of such act have a necessary or proper connection with or relation to the title it is not open to this objection. * * * The word 'subject,' as used in the constitution, signifies 'the matter or thing forming the groundwork.' It may contain many parts which grow out of it and are germane to it, and which, if traced back, will lead the mind to it as the generic head. * * * It is not required that the title of an act be so worded as to form an index to all the provisions contained therein, and mere mentioning in the title of related particulars is not a stating of a plurality of subjects."

Our statute is entitled "An Act requiring compensation for causing death by wrongful act, neglect or default"; certainly the proviso setting forth the circumstances under which an action may be maintained relates to this subject matter.

Finally we pause to consider plaintiff's contention that the court erred in not sustaining its motion to transfer the case to the District Court in Utah pursuant to §1406(a) of the Judicial Code, 28 U.S.C. §1406(a). This section applies only when a case has been filed in the wrong venue. *Orr v. United States*, 174 F. 2d 577, 580. Compare *Riley v. Union*

Pac. R. Co., 177 F. 2d 673, and *Trust Co. of Chicago v. Pennsylvania R. Co.*, 183 F. 2d 640, 646. Unfortunately here the District Court had no jurisdiction of the subject matter, hence it had no power to transfer the case to another court.

For the reasons stated, the judgment of the District Court must be affirmed. It is so ordered.

And on the same day, to-wit, on the fifth day of July, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, July 5, 1951.

Before:

Hon. Otto Kerner, Circuit Judge.

Hon. Philip J. Finnegan, Circuit Judge.

Hon. Walter C. Lindley, Circuit Judge.

First National Bank of Chicago,
Executor of the Estate of John
Louis Nelson, Deceased,
Plaintiff-Appellant,

No. 10337

vs.

United Air Lines, Inc., a
Corporation,

Defendant-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois East-
ern Division.

This cause came on to be heard on the transcript and the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

And afterward, to-wit, on the eighteenth day of August, 1951, there was filed in the office of the Clerk of this Court a designation of Record which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10337.

The First National Bank of Chicago,
Executor of the Estate of John
Louis Nelson, Deceased,
Plaintiff-Appellant,

vs.

United Air Lines, Inc., a
Corporation,
Defendant-Appellee.

Appeal from the
District Court of
the United States
for the Northern
District of Illinois,
Eastern Division.

DESIGNATION OF RECORD.

To: Hon. Kenneth J. Carrick,
Clerk of United States Court of Appeals for the
Seventh Circuit,
1212 Lake Shore Drive,
Chicago 10, Illinois.

The undersigned request you to make a transcript to be filed as the record on petition for writ of certiorari to the United States Supreme Court consisting of all docket entries, all papers filed, and all proceedings had in the above entitled case, including the following:

1. The printed record in said case.
2. Certified copy of the order of the Supreme Court denying certiorari.
3. Opinion of the Court of Appeals.

Designation of Record.

4. Judgment of the Court of Appeals.

Dated at Chicago, Illinois, this 16th day of August, 1951.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
Of Bishop & Burdett,
*Attorneys for the First National
Bank of Chicago, Executor of
the Estate of John Louis Nel-
son, deceased, plaintiff-appel-
lant,*
141 West Jackson Blvd. Ha-
7-3215.

Received a copy of the foregoing Designation of Record
this 16th day of August, 1951.

Kirkland, Fleming, Green, Martin &
Ellis,
David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green, Mar-
tin & Ellis,
*Attorneys for defendant-ap-
pellee.*

Endorsed: Filed August 18, 1951. Kenneth J. Carrick,
Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the designation of record, filed August 18, 1951, in

Cause No. 10337.

The First National Bank of Chicago, Executor of the
Estate of John Louis Nelson, Deceased,
Plaintiff-Appellant,

vs.

United Air Lines, Inc., a Corporation,
Defendant-Appellee,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of August A. D. 1951.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

[fol. 55] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951.

No. 349

FIRST NATIONAL BANK OF CHICAGO, as Executor of the Estate
of John Louis Nelson, Deceased, Petitioner,

vs.

UNITED AIR LINES, INC.

ORDER ALLOWING CERTIORARI—Filed November 13, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8512)